94-1193

No.

FILED
FEB 3 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW THOMURE,
Petitioner,

v.

PHILLIPS FURNITURE COMPANY,
THOMAS PHILLIPS, SR. and THOMAS PHILLIPS, JR.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS E. PENNINGTON, III*
DANIEL V. CONLISK
DANKENBRING, GREIMAN, OSTERHOLT
& HOFFMANN, P.C.
7733 Forsyth Boulevard, Suite 810
St. Louis, Missouri 63105
(314) 863-7733

Attorneys for Respondents

*Counsel of Record

St. Louis Law Printing, Inc 13307 Manchester Rd St. Louis, MO 63131 314-231-4477

BEST AVAILABLE COPY

19pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals, acting on the widespread belief that juries are unduly sympathetic to plaintiffs in age discrimination cases, erred in substituting its view of the facts for that of the jury when it vacated a jury verdict in favor of the plaintiff which had substantial evidence in the record to support it?*

---

* The Respondents have not reformulated this question only because it indicates — on its face — the lack of substance in this petition. The Respondents' decision not to reformulate the question should not be construed as agreement with the premise or the meritoriousness of the question presented by Petitioner.

LIST OF PARTIES

Phillips Furniture Company is a Missouri corporation. It is affiliated with La-Z-Boy Furniture Galleries of St. Louis.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Statute Involved	1
Statement of the Case	2
Reasons for Denying the Writ	3
I. The Petition Seeks Nothing More Than This Court's Review of the Facts and Evidence Presented Below, And Raises No Issues Warranting A Writ of Certiorari	3
II. Petitioner's Imaginative Claim That United States Courts of Appeals Are "Deeply Suspicious" Of Juries in Age Discrimination Cases Enjoys No Support In The Record or Elsewhere	4
III. The Court Below Fully Considered and Correctly Decided the Issues Presented on Appeal	7
Conclusion	13

TABLE OF AUTHORITIES

Page(s)

Cases:

Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.), *cert. denied*, 115 S.Ct. 666 (1994) 5

Brown v. Sites Concrete, 994 F.2d 553 (8th Cir. 1993) 5

Glover v. McDonnell Douglas Corp., 981 F.2d 388 (8th Cir. 1992), *cert. granted, vacated and remanded*, 114 S. Ct. 42 (1993), *on remand* 12 F.3d 845 (8th Cir.), *cert. denied*, 114 S. Ct. 1647 (1994) 6

Hazen Paper Co. v. Biggens, 113 S.Ct. 1701 (1993) ... 12

Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051 (8th Cir. 1993) 7

Nelson v. Boatman's Bancshares, Inc., 26 F.3d 796 (8th Cir. 1994) 5

N.L.R.B. v. Hendricks County, 454 U.S. 170 (1981).... 3

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 11

Rudolph v. United States, 370 U.S. 269 (1962) 3

Smith v. World Insurance Co., 38 F.3d 1456 (8th Cir. 1994); 5

Texas v. Mead, 465 U.S. 1041 (1984) 3

Thomure v. Phillips Furniture Co., 30 F.3d 1020 (8th Cir. 1994) 2,4

Turner v. North American Rubber, Inc., 979 F.2d 55 (5th Cir. 1992) 5

United States v. Johnson, 268 U.S. 220 (1925) 3

Statute:

Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) and (2) 1

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW THOMURE,
Petitioner,

v.

PHILLIPS FURNITURE COMPANY,
THOMAS PHILLIPS, SR. and THOMAS PHILLIPS, JR.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTE INVOLVED

The Age Discrimination in Employment Act prohibits *only* those employment actions based upon the age of the employee:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

See 29 U.S.C. § 623(a)(1) and (2).

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case, with the exception of the statement that plaintiffs alleged in their suit that defendants "cut [plaintiffs'] wages and vacation benefits, as well as the wages of other older employees, on account of their age in an effort to get them to resign or retire from the company." No such allegations were made in plaintiffs' original Complaint, nor did plaintiffs clearly articulate at trial the theory that plaintiffs' wages and benefits were cut to induce them to resign or to retire. That theory first emerged on appeal.

Respondents incorporate by reference the statement of facts set forth in the Opinion of the Eighth Circuit. *Thomure v. Phillips Furniture Co.*, 30 F. 3rd 1020, 1022-23 (8th Cir. 1994).

REASONS FOR DENYING THE WRIT

I. The Petition Seeks Nothing More Than This Court's Review Of The Facts And Evidence Presented Below, And Raises No Issues Warranting A Writ Of Certiorari.

This Court needs to look little beyond Petitioner's "Question Presented For Review" to recognize that this case presents no issues worthy of certiorari. Although the Court announced long ago that it does "not grant a certiorari to review evidence and discuss specific facts," *United States v. Johnson*, 268 U.S. 220, 227 (1925),[1] that is exactly what Petitioner requests here. Petitioner does not identify, nor could he, any conflict between the Eighth Circuit's decision in this case and any decision of other United States Courts of Appeals or of this Court. He does not complain that the Eighth Circuit misinterpreted or misconstrued any federal statute, procedure or rule. Nor does Petitioner contend that the decision below involves a substantial constitutional issue.

To the contrary, the Petition is nothing more than an invitation to review the particular facts and evidence in this case with the hope that this Court will find what the Eighth Circuit could not: any substantial evidence tending to support Petitioner's claims that Respondents had an age-based, discriminatory motivation in imposing a financially necessary pay reduction that affected employees at the upper end of the pay scale more than it did those at the lower end.

---

[1] *See also N.L.R.B. v. Hendricks County*, 454 U.S. 170, 179 n. 8 (1981) (Court dismissed writ of certiorari as improvidently granted on issue that "presented a question of fact, which does not merit Court review."); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (Court dismissed writ of certiorari as improvidently granted because it required review of "ultimate facts" which "would be of no importance save to the litigants themselves."); *Texas v. Mead*, 465 U.S. 1041, 143 (1984).

Simply stated, the Petition presents no important questions meriting treatment by this Court. It is nothing more than Petitioner's further attempt to exempt himself — because of his age — from the effects of cost-cutting measures borne by all other, similarly situated employees.

II. Petitioner's Imaginative Claim That United States Courts Of Appeals Are "Deeply Suspicious" Of Juries In Age Discrimination Cases Enjoys No Support In The Record or Elsewhere.

Apparently recognizing that this case presents no issue that would justify a writ of certiorari, Petitioner advances the preposterous claim that the Eighth Circuit's decision was motivated improperly by that Court's "deep suspicion" of juries in age discrimination cases and — more ridiculously — that the Eighth's Circuit's suspicion is symptomatic of a "widespread belief" held by the United States Courts of Appeals that ADEA juries are "unduly sympathetic to plaintiffs." Petition for Writ of Certiorari, pp.4-5 (hereinafter the "Petition"). Not surprisingly, this contention is wholly unsupported by the record in this case and the Petition offers no support for it from other sources.

The Eighth Circuit's Opinion expressly recognizes the deference owed to jury verdicts in age discrimination cases. Before undertaking its analysis of the evidence, the Eighth Circuit properly stated the applicable standard of review: "we must consider the evidence in the light most favorable to sustaining the verdict, resolving evidentiary conflicts in favor of the verdict;" and pledged to follow it: "[w]e recite the evidence here keeping that standard in mind." *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1022 (8th Cir. 1994). The detailed evidentiary discussion that follows does not even mention the jury. The Court's sole focus is whether the evidence adduced at trial, when considered under this standard, can "support an inference that age was a motivating factor in Phillip's compensation decisions." *Id.* at 1025.

Against this background, Petitioner fails to identify any statement in the Opinion which even remotely reflects that the Eighth Circuit displaced the proper standard of review with its own "deep suspicion" and distrust of unduly "sympathetic" ADEA juries. To the contrary, Petitioner's argument rests upon a single, off-hand comment allegedly made by one of the members of the panel which heard oral arguments in this case. Petition, p. 5. This comment and two decisions from *other* circuits — without more — serve as the basis for Petitioner's contention that the entire federal appellate judiciary holds a "seldom[ly] openly expressed" bias against ADEA juries. *Id.*

Incredibly, the two decisions which Petitioner cites as indicative of a "growing lack of respect" among appellate judges for ADEA juries' verdicts were decided more than one and one-half years apart in different circuits. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994) (decided July 22, 1994); *Turner v. North American Rubber, Inc.*, 979 F.2d 55 (5th Cir. 1992) (decided December 14, 1992).[2] Petitioner fails to explain how these two isolated decisions constitute a "growing" anti-ADEA jury bias among federal appellate judges.

Even a cursory review of Eighth Circuit decisions in appeals from ADEA jury verdicts demonstrates exactly the contrary. Numerous recent Eighth Circuit decisions affirm, in whole or in part, ADEA jury verdicts. *See, e.g., Smith v. World Insurance Co.*, 38 F.3d 1456, 1460-62, 1464 (8th Cir. 1994); *Nelson v. Boatman's Bancshares, Inc.*, 26 F.3d 796, 802-03 (8th Cir. 1994); *Brown v. Sites Concrete*, 994 F.2d 553, 557 & Appendix at 564 (8th Cir. 1993). Petitioner's counsel is well aware of this

---

[2] *Birkbeck* does not support Petitioner's argument. In that case, the District Court granted the defendant's motion for a judgment as a matter of law after a jury verdict in the plaintiff's favor. *Birkbeck*, 30 F.3d at 509. The Fourth Circuit shared the district court's view that the lay-offs giving rise to the case were economically motivated rather than age motivated, and affirmed the decision. *Id.* at 511.

fact, recently having represented a plaintiff who won a substantial ADEA jury verdict which the Eighth Circuit affirmed. *See Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393 (8th Cir. 1992) ("*Glover I*"), *cert. granted, vacated and remanded* 114 S. Ct. 42 (1993), *on remand* 12 F.3d 845, 848 (8th Cir. 1994) ("*Glover II*"). In that case the Eighth Circuit gave due deference to the jury's factual determinations.[3] The court expressly stated in *Glover I*:

> [W]e reiterate our belief that this is an extremely close case. . . Sharply contrasting testimony was presented to the jury, and the jury chose to believe Glover; there is nothing in the record that demonstrates, as a matter of law, this decision was improper or unfounded. The jury simply found Glover to be more credible, and we cannot disturb this determination on appeal.

Glover I, 981 F.2d at 393. On remand, the court reiterated this standard. *See Glover II*, 12 F.3d at 848.

In short, Petitioner's claim that the Eighth Circuit and the entire federal judiciary are unfairly biased against ADEA jury verdicts is nothing more than an attempt to inject systemic importance into a case where it is otherwise lacking. The Petition, when purged of these imaginative suppositions, merely presents for determination one question: Was the Eighth Circuit correct in concluding that Petitioner failed to make a submissible case for age discrimination. Not only did the Eighth Circuit properly decide this question (see discussion below), but the Petition presents no issues warranting a writ of certiorari.

---

[3] In fact, two members of the Eighth Circuit Panel in the *Glover* case, the Honorable Judges Floyd R. Gibson and Morris Shepard Arnold, were also members of the panel in this case.

III. The Court Below Fully Considered And Correctly Decided The Issues Presented On Appeal.

Petitioner's argument for a writ of certiorari, if accepted, would eviscerate an essential function of our Courts of Appeals. If federal appellate courts, applying the applicable standard of review, could and should never reverse jury verdicts, the appellate process would become meaningless. Neither the Courts of Appeals nor trial courts are bound to "rubber stamp" jury verdicts simply because a jury's factual determinations are entitled to great deference. Rather, appellate courts must, under appropriate and oft-stated standards, determine independently whether there is sufficient, competent evidence to support jurys' verdicts.

The Eighth Circuit did exactly that in this case, and Petitioner has raised no legitimate points to indicate otherwise. The Court correctly stated:

> When reviewing a decision to deny judgment as a matter of law in the face of a jury verdict finding age discrimination, we must consider the evidence in the light most favorable to sustaining the verdict, resolving evidentiary conflicts in favor of the verdict.[4]

30 F.3d 1020, 1022. We give deserved deference to the Court's assurance that it followed this standard in reviewing the record and in deciding that Petitioner failed to present evidence from which a reasonable juror could find that Petitioner's age was a factor in the decision to reduce his pay and benefits. *Id.*

---

[4] It should also be noted that, under this standard of review, the Court of Appeals (a) assumes as proved the facts which the verdict-winner's evidence tends to prove, and (b) gives the verdict-winner the benefit of all favorable inferences that may *reasonably* be drawn from the facts proved. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056 (8th Cir. 1993).

Most of the material facts were not seriously disputed, although Respondents and the Court of Appeals disagreed with the multiple levels of inferences Petitioner sought to have drawn from the facts. There was no dispute that, during the period in question, Phillips Furniture Company did very poorly. The company's net worth dropped by more than $800,000 - reducing its net worth from a positive to a negative. Total employment at the company dropped from over eighty (80) to thirty (30). It had a legitimate business reason to implement drastic cost cutting measures, which included laying off a number of employees and cutting the wages of those who remained. While Respondents recognize that these legitimate business reasons would not allow the company disproportionately to reduce Petitioner's wages because of his age, what was the evidence that Phillips Furniture did so? Viewed in the light most favorable to Petitioner, and with all conflicts of evidence resolved and all reasonable inference drawn in favor of Petitioner, his case for age discrimination was as follows:

In 1988, Petitioner was the second oldest and most senior employee in Phillips Furniture's warehouse. He was also the most highly paid. He was excellent at his job. He received regular pay increases through and including 1987.

In the winter of 1987-1988, Phillips Furniture suffered a marked decrease in sales and began to lose money. The company laid off several warehouse employees, all of whom were under the age of forty. In July, 1988, the company announced a general five percent pay cut for warehouse employees at certain levels of the pay scale *and* a larger cut for those at the top of the pay scale. Petitioner was one of the latter. Even after the 1988 cuts, Petitioner remained the highest-paid warehouse employee. Nonetheless, according to Petitioner, Thomas Phillips, Jr. told Petitioner that if he did not like the pay cut, he could quit.

Petitioner was just one of a group of the company's most highly compensated warehouse employees whose pay was cut

more than five percent in 1988. In that group, one employee was in his mid-thirties and five were over forty. Petitioner offered no evidence as to the ages of most of the employees who received a cut of five percent or no cut at all. There was evidence, however, that two employees who were age 50 received only a five percent cut.

The company continued to lose money. Its store in St. Charles, Missouri, which it had opened at great expense in 1987, was closed at further expense in 1989. This forced the lay-off of additional employees. Also in 1989, in an effort to further reduce costs, the company cut the pay of its three highest-paid warehouse employees, including Petitioner.[5] Petitioner's pay was originally to be cut from $14.00 to $11.00. But after he complained about the size of the cut, the company lessened the cut, reducing his pay to $12.00 instead of $11.00. Also, the company allowed Petitioner, upon his request, to return to a four-day-a-week work schedule. Such a schedule was desirable to Petitioner but a hardship to the company. At the time Thomas Phillips, Sr. (age fifty-nine) first told Petitioner about the cut, he suggested that Petitioner might want to consider retiring.

Once again, Petitioner offered no evidence as to the ages of the bulk of employees who did not receive a pay cut in June, 1989.

In 1989, an older warehouse employee retired and was not replaced. As he left his retirement party, he overheard Mr. Phillips, Jr. tell someone that if the company "could just get rid" of Petitioner and Joe Williams, "everything would be alright." (Interesting, when the company had the opportunity to "get rid" of Joe Williams with the 1989 closing of its St. Charles store, where Williams worked, it did not; instead, the company transferred Mr. Williams to its St. Louis warehouse.)

---

[5] In the interest of brevity, Respondent will not recite the evidence of the numerous other cost-cutting measures that the company implemented in 1988 and 1989 and later in 1990.

Even after this employee retired, the company's finances required that an additional warehouse employee be laid off. The decision of whom to lay off came down to two employees: the assistant warehouse manager and a laborer. The assistant warehouse manager, who was in his thirties, had more years of service and was earning $8.60 per hour, while the laborer was earning $6.75. The assistant manager, because of his seniority, was given the choice of either being laid off or keeping his job at the lower rate of pay of the laborer. He chose to stay and accept a pay cut. (Due to a clerical error, his pay cut was not properly processed). In the same year, the company also laid off one of its store managers, who was thirty-seven at the time.

Some months later, after Petitioner filed his charge of age discrimination, Mr. Phillips Jr. asked him what he hoped to gain by filing the charge. When he stated that he wanted to have his salary restored, Mr. Phillips, Jr., according to Petitioner, became "abusive", accused Petitioner of not caring for the company, and told him he would be "history".

In 1990, in conjunction with other cost-cutting measures, Phillips Furniture capped employees' annual paid vacation time to two weeks. The new policy affected only Petitioner and Joe Williams, as they were the only employees who had more than twenty-five years of service and therefore had been entitled to four weeks' paid vacation.

This is the sum and total of Petitioner's case. Petitioner's protestations notwithstanding, the Court of Appeals did not ignore this evidence or give it "an interpretation in favor of the Defendants." Petition, p. 4. Rather, the Court of Appeals carefully considered Petitioner's evidence and correctly concluded that it was insufficient to make a submissible case of age discrimination. 30 F.3d at 1023. Two evidentiary points, both of which Petitioner cites, illustrate the flaw in his case.

First, Petitioner seized upon a statement allegedly made by Mr. Phillips, Jr. about "getting rid of " Petitioner and Joe

Williams. Petitioner presumably would argue that that remark constitutes direct evidence of age discrimination. The critical question is: How does such a remark, either standing alone or viewed in the context of Petitioner's case, evince age animus? Respondents submit that the remark falls into the category of "statements by decision makers unrelated to the decisional process," and one which simply does not support the inference Petitioner wants drawn from it. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). Second, to give the remark the probative weight Petitioner desires, the factfinder is forced to infer: one, that management wanted to get rid of Petitioner and Williams; two, that management wanted to get rid of them because of their age; and three, since the company did not get rid of them - that is, terminate them outright - it cut their wages to get them to quit.

The applicable standard of review allows Petitioner the benefit of all inferences that *reasonably* may be drawn from the facts; it does not permit the stacking of inference upon inference upon inference, which amounts to rank speculation.

Petitioner also cites, again presumably as direct evidence of age discrimination, the suggestion by Mr. Phillips, Sr. that Petitioner might want to consider retiring - a suggestion made when Mr. Phillips informed Petitioner of a second pay cut and Petitioner vigorously complained about it. Is it reasonable to infer from such a statement, without regard for the context in which it was made, that Mr. Phillips had some age discriminatory motive when he made it? To reach that conclusion, the factfinder must deduce that, in making the suggestion, Mr. Phillips intended to pressure Petitioner to quit, and second, that he intended to pressure Petitioner to quit because of his age. Here again, the factfinder is forced to engage in rank speculation. Speculation is not within the province of the trier of fact.

The Court of Appeals did not ignore Petitioner's evidence or give the evidence a "defendants interpretation." It carefully reviewed the evidence in the light most favorable to Petitioner (accepting as proved certain facts which Respondents disputed)[6] and fairly considered the inferences that could *reasonably* be drawn from the facts. The inferences Petitioner argued to the jury were not reasonable, and the Court of Appeals was properly circumspect in refusing to allow the jury's verdict to stand.

Petitioner's case was built on the faulty premise that the Age Discrimination in Employment Act is intended to provide older workers with insurance against adverse employment decisions. It is not. The statute is designed to protect older employees from adverse employment decisions made "on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggens*, 113 S.Ct. 1701, 1706 (1993). Where, however, the employer's decision is "wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.*

Here, undisputed evidence established that the financial condition of the employer necessitated action to reduce the wages of its employees (even while it was laying off others). In the process, the wages of the highest paid employees were cut to a greater degree than those of lower-paid employees. That the wages of a disproportionate number of ADEA-protected employees were reduced more does not render the wage-reduction process age discriminatory in the absence of evidence that age or age animus actually played a role in and had a determinative effect on the outcome of the process. Petitioner presented no evidence, direct or indirect, that it did. The Court of Appeals was correct in concluding that he failed to make a submissible case. *Hazen Paper*, 113 S.Ct. at 1706.

---

[6] Mr. Phillips, Jr., for example, denied making the "get rid of" comment. In his fascination with the unsupportable, Petitioner argues that age discrimination, and in particular, an intention on the part of Respondents to conceal age discrimination, may be inferred from the "fact" of the denial.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Francis E. Pennington, III
Counsel of Record
Daniel V. Conlisk
DANKENBRING, GREIMAN,
OSTERHOLT & HOFFMANN, P.C.
7733 Forsyth Boulevard, Suite 810
St. Louis, Missouri 63105
(314) 863-7733

Attorneys for Respondents